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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PATRICK J. CONNOLLY,

Petitioner,

v.

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the Claims Court is without jurisdiction to entertain wrongful removal actions by probationary employees of the United States Postal Service—whether or not such claims involve first amendment allegations?

2. Did the Court of Appeals err in holding that a probationary employee has no right under the Civil Service Reform Act to seek review of his dismissal in the Claims Court, even if his dismissal is founded upon first amendment violation?

3. Did the Court of Appeals err in holding that the Civil Service Reform Act has foreclosed judicial review of wrongful removal actions by probationary employees of the United States Postal Service?

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OPINIONS BELOW

The opinion of the United States Claims Court is reported at 1 Cl. Ct. 312, 554 F. Supp. 1250 (1982). The opinion of the Court of Appeals for the Federal Circuit is reported at 716 F. 2d 882 (F. Cir. 1983).

JURISDICTION

The order of the Court of Appeals for the Federal Circuit was made on September 6, 1983 and entered on September 28, 1983. A copy thereof is appended to this petition in the Appen-

dix. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES, FEDERAL RULES and REGULATIONS INVOLVED

The following are those constitutional provisions and statutes which are relied upon by the petitioner.

The First Amendment to the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

5 U.S.C. Section 5596 provides as follows in relevant part:

> (b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination . . . is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee-
>
> (a) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect-
>
> (1) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred . . .

28 U.S.C. Section 1491 provides in applicable part:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the

United States founded either upon the Constitution, or any act of Congress, or any regulation of an executive department, or upon any expressed or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

39 U.S.C. Section 1005(f) provided in relevant part:

Compensation, benefits, and other terms and conditions of employment in effect immediately prior to the effective date of this section, whether provided by statute or by rules and regulations of the former Post Office Department or the executive branch of the Government of the United States, shall continue to apply to officers and employees of the Postal Service, until changed by the Postal Service in accordance with this chapter and chapter 12 of this title.

STATEMENT OF THE CASE

The original action, herein, was commenced in the United States Court of Claims, the predecessor to the United States Claims Court (No. 406–81C) on the 26th day of June, 1981. Petitioner alleged that the termination of his probationary employment with the United States Postal Service was improper, in part, because the agency action was not the result of an honest dissatisfaction with petitioner's conduct and performance. In addition, petitioner contended that respondent did not give him a fair trial on the job and was, instead, motivated by malice and bad faith. Petitioner also contended that his dismissal was in reprisal for a job-related injury, compensation claim and complaints about the absence of safety procedures. Petitioner also contended that respondent's actions were not in accordance with applicable law, regulation and procedure.

The facts upon which this action was based are as follows. Petitioner commenced employment at the Flagstaff, Arizona Post Office on April 4, 1981. His general duties included the casing and sorting of mail and the tilting, lifting and pushing of heavy cages of parcel post packages into trucks.

On or about April 18, 1981, petitioner began suffering numbness in his left and right fingers and hands, and throbbing pain in his left and right forearm. The pain was severe during working hours. Petitioner had not previously suffered from such a condition. After petitioner's condition arose, his supervisors were aware of the condition and its affect on his ability to perform his strenous job duties.

On May 12, 1981, petitioner sought the medical advice of Michael G. Hummer, M.D. a neurologist. Dr. Hummer stated that petitioner's condition was caused by his employment. The doctor prescribed that petitioner wear braces to work on May 13, 1981. On the previous day, May 12, 1981, petitioner commenced filing procedures to claim compensation with the United States Department of Labor arising out of this uncontraverted occupational injury.

Meanwhile, on May 4, 1981, petitioner had received his thirty day evaluation. His performance was rated unsatisfactory in the areas of "productivity and work habits", "safety", and "acceptance of criticism". However, he was recommended for continued employment. Thereupon, approximately nine days later, on May 13, 1981, petitioner received yet another evaluation. This evaluation was completed after petitioner had submitted his Labor Department Compensation Claim. This evaluation recommended petitioner's dismissal.

Soon after petitioner received his second evaluation on May 14, 1981, he received a letter signed by A. W. Baker, Postmaster, United States Postal Service in Flagstaff, Arizona, notifying him that he was being separated from the U.S. Postal Service "effective immediately". This separation notice informed petitioner that he was being discharged because of "unsatisfactory rating on your initial probationary period evaluation report, and lack of improvement in those areas as noted in the second report". In addition, petitioner's "attitude toward supervision" was documented as unsatisfactory on the second evaluation. During this entire period, it must be noted that petitioner had complained to his supervisors about the lack of adequate safety and training procedures.

Petitioner requested reinstatement into his former position, with all rights, privileges and emoluments thereof including but

not limited to all back pay and other allowances otherwise due him. Additionally, petitioner sought an order directing respondent to correct his personnel records as well as compensatory and punitive damages and attorney's fees.

Respondent, thereafter moved for summary judgment alleging that the Court lacked jurisdiction to review the dismissal of a probationary employee. In response thereto, petitioner cross-moved for summary judgment alleging, among other things, that his dismissal was unlawful.

After oral argument and discovery, the Claims Court, by Chief Justice Kozinski denied petitioner's cross-motion and granted respondent's motion except to conclude that "it had jurisdiction over that portion of [petitioner's] claim which is based upon allegations that the dismissal was taken in retaliation for the exercise of first amendment rights." In so doing the court noted the "irreconciable tension" between *Featheringill* v. *United States*, 217 Ct. Cl. 24 (1978) and *Jackson* v. *United States* 428 F. 2d 844, 192 Ct. Cl. 765 (1970) but that the "Court of Claims treated both lines of cases as good law to the end."

In its order, the Claims Court certified the first amendment issue for interlocutory appeal to the United States Court of Appeals for the Federal Circuit. The Federal Circuit then granted respondent permission to appeal. Its appeal soon followed.

The court sitting *in banc*, rendered its decision on September 6, 1983. In its decision, the court affirmed the trial court's determination that it lacked jurisdiction over petitioner's claim on other than first amendment rights. However, it reversed the trial court's ruling that it possessed jurisdiction over petitioner's first amendment claim. The court remanded the case to the Claims Court with instructions to grant judgment in favor of respondent by dismissing petitioner's petition. The Claims Court then did so in an order dated October 13, 1983.

In so determining the Federal Circuit ruled that its action on appeal "is not circumscribed by the terms of the trial court's certification." It then held "that the nature and scope of our review are not limited to the certified question but that we are free to consider all questions material to the trial court's order

sustaining its jurisdiction." The court then ventured into a wide ranging discussion of whether the Claims Court could *ever* entertain a probationary employee's wrong removal action "on any jurisdictional basis." The court held, that with one possible exception, not relevant herein, that it could not.

In reaching this conclusion, the Federal Circuit held that the Civil Service Reform Act precluded such review. This, the Court held, includes any private right of action in the Claims Court. Nor, said the Court, can petitioner find solace in the first amendment, because that amendment standing alone, cannot be interpreted to command a payment of money. The court distinguished petitioner's situation from those of the plaintiff's in *Jackson* v. *United States*, 428 F. 2d 844, 192 Ct. Cl. 765 (1970) and *Swaaley* v. *United States*, 376 F. 2d 857, 180 Ct. Cl. 1 (1967). In those cases, the court held that the plaintiffs relied upon pay statutes, including 5 U.S.C. 5596, in conjunction with the first amendment. Petitioner, as a Postal Service employee, said the court, cannot rely upon a similar pay statute.

Petitioner, disagreeing with this determination, now seeks review in this Court.

EXISTENCE OF JURISDICTION BELOW

The Claims Court held that it had jurisdiction pursuant to 28 U.S.C. Section 1491 and the first amendment. The Federal Circuit held that no such jurisdiction existed.

ARGUMENT

The decision should be reviewed because it presents questions which heretofore have not been considered by this court. In addition, the decision of the Federal Circuit represents a substantial departure from previously established decisional law.

1) As already noted, the Federal Circuit held that the Claims Court could not entertain petitioner's action on any jurisdictional basis including the first amendment or federal pay stat-

utes. In addition, the Federal Circuit ruled that the Civil Service Reform Act has precluded any private right of action which petitioner may have otherwise enjoyed. Petitioner contends that the Federal Circuit's determination, the Civil Service Reform Act notwithstanding, presents a significant departure from prior decisional law and is of such far reaching importance so as to merit review by this Court.

The Claims Court and its predecessor, the Court of Claims, had always recognized that dismissed probationary employees were not without a private right of action. The Federal Court, by relying on the Civil Service Reform Act, has apparently closed the door on such a private right.

One of the standards of review, always recognized by the Court of Claims, was whether the agency officials who discharged the employee during his probationary period acted upon "their honest judgment" in effectuating the removal. *Perlongo* v. *United States*, 215 Ct. Cl. 982(1977). The *Perlongo* Court more fully elaborated upon this standard of review.

> Substantively, the only limitation on an agency's power to dismiss a probationary employee is that the agency must honestly be dissatisfied with the probationer's conduct or performance after giving him a fair trial at the job. (Emphasis added). *Perlongo* v. *United States, supra., Horne* v. *United States*, 190 Ct. Cl. 145 (1969); *Dargo* v. *United States* 176 Ct. Cl. 1193 (1966).

The Court of Claims had also held that a discharge not brought about under these circumstances was "so lacking in rational support that it must be characterized as arbitrary and capricious." *Horne* v. *United States, supra; Greenway* v. *United States*, 175 Ct. Cl. 350 (1966); *Knotts* v. *United States*, 128 Ct. Cl. 489 (1954). The Court of Claims had further held in *Powers* v. *United States*, 169 Ct. Cl. 626 (1965) that "when the issue of arbitrary, capricious or malicious action on the part of the Government is properly raised, judicial inquiry is proper" in a probationer's dismissal.

Other decisions of the Court of Claims which reviewed a probationer's termination are also enlightening. The Court in *Greenway* v. *United States*. *supra* held:

> Where an agency promulgates duly authorized regulations concerning probational employees which specify the manner in which their employment is to be terminated, a severence effected without substantial compliance is invalid. *Watson* v. *United States*, 142 Ct. Cl. 749 (1958); *Daub* v. *United States*, 154 Ct. Cl. 434 (1961). This is merely another application of the basic principle that separations made in a manner that do not conform with the requirements of a valid departmental regulation are not lawful. *Service* v. *Dulles*, 354 U.S. 363 (1957); *Starzee* v. *United States*, 145 Ct. Cl. 25 (1959).

The Court in *Greenway* further held that review is proper

> (W)here an employee, probationary or otherwise, is by regulation or statute protected in that he is entitled to honest consideration based on the merits, but it is charged that the action of the responsible personnel official or officials was instead arbitrary, capricious, or maliciously motivated.

The Federal Circuit's determination that the Civil Service Reform Act precludes such review in the future is a most important one which should be reviewed by this Court. Upon such review, it will be seen that the Civil Service Reform Act did nothing to alter the prior state of law.

2) The Federal Circuit also incorrectly held that a probationary employee may not bring an action under 28 U.S.C. Section 1491 based on a claim that his removal was motivated by retaliation for the exercise of first amendment rights.

A review of firmly established precedent set by the Court of Claims and adopted by the Claims Court indicate that where a first amendment issue is involved, the Court of Claims has on many occasions granted Tucker Act jurisdication.

In *Swaaley* v. *United States* 180 Ct. Cl. 1 (1967), the Court of Claims considered the general question of whether it had Tucker Act jurisdiction over a claim alleging that an employee dismissal was motivated by retaliation for the exercise of First Amendment rights. The plaintiff was a wage board employee at the

former New York Naval Shipyard. He brought an action to recover back pay lost as the result of his allegedly illegal dismissal. The plaintiff in *Swaaley* averred that he was dismissed because he made unfounded charges against officials of the Navy Department. These charges detailed alleged favoritism and wrongdoing by officials at the said Shipyard. The issue as framed by the Court was whether the plaintiff's discharge deprived him of his right to "petition the Government for a redress of grievances" under the First Amendment. Id. at 3.

The Court considered plaintiff's First Amendment claim and held that the First Amendment guarantee of the right to petition the Government for redress of grievances protected him from dismissal. In fact, the Court expressly held that, "a petition by a federal employee to one above him in the executive hierarchy is covered by the First Amendment." *Id.* at 12. The Court thus ruled the plaintiff's dismissal invalid.

After having established that the Court has Tucker Act jurisdiction to review First Amendment infringement claims, the Court of Claims considered whether the same scope of review extends to probationary employees. The issue was answered affirmatively by the Court of Claims in *Jackson* v. *United States*, 192 Ct. Cl. 765 (1970). There, the plaintiff, a probationary employee, alleged that he was wrongfully discharged from his position as a teacher, GS-9 at the Job Corps Conservation Center in New Mexico. Since plaintiff was a probationary employee, the normal review process of the Civil Service was unavailable to him. *Id.* at 768. Plaintiff, therein, nevertheless filed suit in the Court of Claims alleging that his removal was in retaliation for his exercising his First Amendment right to petition the Government for a redress of grievances.

The alleged constitutional violation was the sole ground upon which the Court considered the action. The Court clearly recognized that it possessed Tucker Act jurisdiction. It noted:

> This is a claim 'founded upon the Constitution' of which we have jurisdiction by virtue of 28 U.S.C. 1491(1), a jurisdiction we have exercised in a recent backpay suit similar to this one. *Swaaley* v. *United States*, 180 Ct. Cl. 1, 376 F. 2d 857 (1967). *Pickering*

> v. *Board of Education*, 391 U.S. 563 (1968) reasons along somewhat parallel lines and contributes to our belief that *Swaaley* was correctly decided. *Id.* at 768.

Thus, the Court specifically held that under 28 U.S.C. Section 1491, the Court of Claims has jurisdiction of a claim founded upon the Constitution, such as a claim for backpay alleging wrongful dismissal from Government service as a reprisal for the exercise of First Amendment rights.

The Court then considered the applicability of this holding to probationary employees. The Court rejected the defendant's contention that a probationary employee could not invoke the constitutional protection and held:

> The constitutional protection of employees against removal because of petitioning for redress of grievances does not depend on the particular employee's status or tenure. *Id.* at 772.

The Court therefore concluded that a genuine issue of material fact existed arising from the alleged constitutional deprivation. The applicability of the *Jackson* case to the case at bar is clear.

The Court of Claims again addressed those issues in *Featheringill* v. *United States*, 217 Ct. Cl. 24 (1978). Although the Court distinguished *Jackson* and *Swaaley* on grounds not applicable herein, it still recognized the validity of the *Jackson* and *Swaaley* holdings which remain valid. *Id.* at 32.

In *Featheringill*, the plaintiff was hired to teach at an Air Force base in Japan for the school year 1974–75. His appointment expired by its terms on June 6, 1975, and he was not rehired. Plaintiff therein contended that he was entitled to be rehired because his nonappointment resulted from the exercise of First Amendment rights.

The Court rejected these claims and held that since plaintiff was seeking a postion other than the one to which he was appointed and because plaintiff never had any entitlement to the job he sought, nor was he owed any money, he could not assert any claim under the Tucker Act. In other words, the plaintiff in *Featheringill* asserted no claim for back pay. The Court thus held:

> Since plaintiff never held and was never entitled to the position he seeks, and is owed no money, this is not a back pay case and the First Amendment issue raised in this context is beyond the jurisdiction of this court.

The *Featheringill* court then considered whether it had jurisdiction to award relief, in the absence of a back pay claim. It ruled that it did not. In doing so, the Court distinguished *Jackson* and *Swaaley*, but nevertheless found them fully valid:

> In those instances where this court has discussed back pay claims in the context of the First Amendment, the claimants had been *dismissed* from their jobs and the suits were maintained on the factual basis of improper removal. *Id.* at 32.

Obviously, the facts in the case before this Court are more closely akin to *Jackson* and *Swaaley* than to *Featheringill*. For we are dealing with a claimant who was dismissed and is maintaining an action in which he seeks back pay on the factual basis of improper removal.

The United States Court of Claims has had the opportunity to reconcile *Featheringill* with *Jackson* in recent cases. *Cole* v. *United States*, 231 Ct. Cl. ____, 689 F. 2d 1040 (1982); *Bowman* v. *United States*, 227 Ct. Cl. ____ (1981). On both occasions, the Court steadfastly adhered to *Jackson* and *Swaaley*.

In *Cole*, a former commissioned officer in the Regular Army brought an action seeking reinstatement and back pay. The plaintiff was a "whistleblower" who regularly reported alleged derelictions of others, for which he was not always appreciated by his superiors. He contended that the defendant refused to accept a withdrawal of his tender of resignation as retaliation for his exercise of First Amendment rights. The Court denied the defendant's motion for summary judgment and held:

> The first amendment law since *Perry* v. *Sinderman*, 408 U.S. 593, 92 S. Ct. 2694, 33 B. Ed. 570 (1972) has been that even one who holds his job on an at-will tenure is protected against discharge in retaliation for past exercises of first amendment rights, or to prevent

> such exercise in the future. In *Jackson* v. *United States*, (citation omitted), we said:
>
> . . . (T)he constitutional protection of employees against removal because of petitioning for redress of grievance does not depend on the particular employee's status or tenure . . .

Thus, the Court held that even an army officer could maintain an action in the Court founded on the First Amendment. Surely, petitioner, as a probationer and an employee of the United States Postal Service should have the same right.

The Court of Claims in *Bowman* reviewed the termination of former probationary forester-trainees who were terminated from the Forest Service, at the end of their probationary period. Relying directly on *Jackson*, the Court denied the defendant's motion for summary judgment "(b)ecause there existed material issues of fact concerning plaintiffs' invocation of the first amendment".

3) The Federal Circuit's attempt to reconcile petitioner's case by contending, that as a Postal Service employee, he cannot rely on pay statutes is incorrect.

The Back Pay Act, 5 U.S.C. Section 5596 is that section of the law which permits federal employees to receive back pay arising from unwarranted personnel actions. The question as to whether Postal Service employees are encompassed within the provisions of the Back Pay Act must be answered in the affirmative. The Postal Reorganization Act did not change this fact. Firstly, it should be undisputed that the Back Pay Act was applicable to the Post Office Department until June 30, 1971, when the operation of the Post Office Department was assumed by the Postal Service. *See e.g. White* v. *Bloomberg*, 345 F. Supp. 133 (D. Md. 1972). All compensation, benefits and other terms and conditions of employment in effect immediately prior to the reorganization, were saved pursuant to 39 U.S.C. Section 1005 (f). This savings clause must surely include the provisions of the Back Pay Act. 39 U.S.C. Section 410 is not to the contrary since it is clearly subject to exceptions otherwise provided, of which 39 U.S.C. Section 1005(f) is one. In fact, the Court of

Claims, in *Butz Engineering Corp.* v. *United States*, 204 Ct. Cl. 561 (1974) noted that the Court of Claims could still obtain jurisdiction in pay suits instituted by Postal Service employees. Other courts holding that Postal Service employees are still covered by the provisions of 5 U.S.C. Section 5596 include *Grimaldi* v. *United States*, 651 F. 2d 151 (2d Cir. 1981) and *Lee* v. *Blount*, 345 F. Supp. 585 (N.D. Cal. 1972).

Thus, insofar as petitioner's constitutional claim is dependent upon the interface with the Back Pay Act, petitioner should have prevailed.

4) The questions presented by this case are of great and recurring significance in the realm of the federal employment system. To accept the Federal Circuit's determination would effectively reverse a continuous line of precedent. No case has gone so far to defeat a probationer's right of action. The Federal Circuit's reliance on the Civil Service Reform Act renders review that much more necessary. A definite opinion by this Court, as to rights remaining to probationer's in the wake of the Civil Service Reform Act is a necessary and appropriate issue for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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APPENDIX

UNITED STATES CLAIMS COURT

No. 406-81C

FILED
DEC 15, 1982
U.S. CLAIMS COURT

PATRICK J. CONNOLLY,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Civilian pay; dismissal; probationary employee; jurisdiction; sovereign immunity; Tucker Act; regulation of executive department; post office; interpretation of legislation as mandating compensation; Civil Service Reform Act; Constitution; First Amendment.

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OPINION

KOZINSKI, Chief Judge.

Prior to the effective date of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, the parties filed cross motions for summary judgment. Because defendant's motion, in part, challenges the court's jurisdiction to grant the relief requested by plaintiff, the court treats it as a motion to dismiss pursuant to Rule 12(b).

FACTS[1]

Plaintiff is a former probationary employee of the United States Postal Service. He was hired on April 4, 1981, as a postal distribution clerk at the main post office in Flagstaff, Arizona. His duties involved sorting and casing mail, and various activities requiring physical exertion such as lifting and pushing of heavy objects. Complaint ¶ 5. After about two weeks, plaintiff developed numbness in his fingers and a throbbing pain in his forearms. The condition was diagnosed on May 12, 1981, as a bilateral Carpal Tunnel Syndrome and the examining physician concluded that the condition was caused by plaintiff's employment. Complaint ¶¶ 6, 12, 13.

Prior to this diagnosis, on May 4, 1981, plaintiff was given a 30-day performance evaluation. The evaluation rated plaintiff as unsatisfactory in "productivity and work habits" and in "safety." The evaluation also noted that plaintiff had initially experienced difficulty in accepting criticism but had since improved. On May 13, 1981, plaintiff received a second evaluation which repeated the unsatisfactory ratings in "productivity and work habits" and "safety." In addition, it rated him unsatisfactory in "attitude towards work—co-workers—supervisors" and "acceptance of criticism," stating that "improvement noted in 1st eval[uation] has stopped." The following day, plaintiff was separated from the Postal Service. The removal letter, signed by A. W. Baker, MSC Manager/Postmaster, listed as reasons for the separation that plaintiff had been rated unsatisfactory in several areas of performance and had shown lack of improvement.

Plaintiff brought suit seeking reinstatement with back pay, correction of his personnel records, $2 million in damages ($1 million compensatory and $1 million punitive), costs and attorneys' fees. Plaintiff argues that the adverse evaluations were "motivated solely by malice and bad faith and were intended in part to be in reprisal for plaintiff's job-related injury, compen-

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[1] The facts recited in the complaint and attachments thereto are deemed established for the purpose of this motion only. *See Prairie* v. *United States*, 224 Ct. Cl. 735, 735 (1980); *Featheringill* v. *United States*, 217 Ct. Cl. 24, 26 (1978).

sation claim and complaints about the absence of safety procedure." Complaint ¶ 34.

Defendant has moved for dismissal, claiming *inter alia* that the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, establishes a comprehensive scheme for dealing with federal employees who complain that they have suffered improper treatment at the hands of their supervisors. It argues that this scheme does not entitle probationary employees to seek relief in this court.

DISCUSSION

In determining a plaintiff's entitlement to relief, one must start with the proposition that this is a court of very limited jurisdiction. Because all claims brought are against the United States and therefore involve a waiver of sovereign immunity, *Porter* v. *United States*, 204 Ct. Cl. 355, 359 (1974); *National State Bank of Newark* v. *United States*, 174 Ct. Cl. 872, 876 (1966), the court must exercise not only the traditional reluctance of federal courts to act absent specific statutory authorization, *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 245 (1845); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807), but an additional measure of restraint growing from the principle that waivers of sovereign immunity must be narrowly construed. *See United States* v. *King*, 395 U.S. 1, 4 (1969); *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941); *Kabua Kabua* v. *United States*, 212 Ct. Cl. 160, 167 (1976), *cert. denied*, 434 U.S. 821 (1977).

Plaintiff brought this action under the Tucker Act, 28 U.S.C. § 1491, which provides that we may "render judgment upon any claim against the United States founded . . . upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States. . . ." As the Supreme Court has noted, "[t]he Tucker Act . . . is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages. The Court of Claims has recognized that the Act merely confers jurisdiction upon it whenever the substantive right exists." *United States* v. *Testan*,

424 U.S. 392, 398 (1976), citing *Eastport Steamship Corp.* v. *United States*, 178 Ct. Cl. 599, 605-07 (1967). *See also Griffin* v. *United States*, 215 Ct. Cl. 710, 713 (1978).

Plaintiff's claim is not under a contract with the United States since it is well established that the federal employment relationship is a statutory rather than contractual one. *See Kania* v. *United States*, 227 Ct. Cl. ____, ____, 650 F.2d 264, 268, *cert. denied*, 454 U.S. 895 (1981); *Shaw* v. *United States*, 226 Ct. Cl. ____, ____, 640 F.2d 1254, 1260 (1981). Plaintiff's claim must therefore arise, if at all, under the Constitution, an Act of Congress or a regulation of an executive department. These possibilities are considered in reverse order.

I. *A Regulation of an Executive Department*

Plaintiff argues that in dismissing him, USPS failed to comply with provisions of its Employee & Labor Relations Manual. At oral argument, defendant conceded that the Manual is properly considered a regulation of USPS. *But see McGrath* v. *United States*, 2 USCCR No. 11, at 6 (December 1, 1982) (SETO, J.) (Federal Personnel Manual held not to be a regulation). *See generally Fiorentino* v. *United States*, 221 Ct. Cl. 545, 551-54 (1979) (discussion of when government "manuals, handbooks, and in-house publications" have binding effect).

Even assuming the manual to be a regulation, it does not necessarily form the basis for an action in the Claims Court because the Tucker Act expressly limits jurisdiction to claims based on regulations of an executive department. The term "executive department" is not defined within Title 28, but section 451 defines "department" by reference to the definition in Title 5 of the Code, "unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government."

Nothing in section 1491 suggests that the term "executive department" as there used refers to the executive branch as a whole. The term quite clearly denotes a subdivision of the executive branch because the section refers to *an* executive

department, suggesting the existence of several. While it makes perfect sense—and comports with established usage, *see, e.g., United States* v. *Germaine*, 99 U.S. 508, 510-11 (1878)—to refer to several executive *departments*, it would be totally nonsensical to read the section as referring to several executive *branches*. Thus, in determining whether a regulation can form the basis for suit under the Tucker Act, the court must, pursuant to 28 U.S.C. § 451, refer to Chapter 1 of Title 5.

Section 101 of Title 5 defines the term "executive department" to include the cabinet level departments. The United States Post Office is not among them. In fact, the Postal Reorganization Act of 1970 explicitly struck the Post Office from this list. Pub. L. No. 91-375, §6 (c)(1), 84 Stat. 719, 775. The status of the Post Office is now defined in 39 U.S.C. § 201 (1980) as "an independent establishment of the executive branch of the Government of the United States. . . ." It follows that the Post Office is not an executive department and that its regulations cannot form the basis for plaintiff's claim under the Tucker Act.[2]

This does not, of course, mean that the Post Office may ignore its regulations. It is well established that a department or agency is bound by the regulations it promulgates. *See, e.g., Service* v. *Dulles*, 354 U.S. 363 (1957); *Cruz-Casado* v. *United States*, 213 Ct. Cl. 498, 502-03 (1977). However, an alleged violation of USPS regulations cannot form the basis for jurisdiction in this court. Of course, if jurisdiction is established on some other basis, plaintiff may rely on any regulation applicable to him in seeking relief.

II. *An Act of Congress*

In 1978 Congress enacted the Civil Service Reform Act (the Act or CSRA) as a comprehensive revision of the laws pertaining

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[2] It is not clear whether plaintiff is also making a claim under regulations issued by the Office of Personnel Management pertaining to probationary employees. Defendant correctly points out, however, that postal service employees are specifically excluded from coverage by those regulations. 39 U.S.C. § 410. In any case, by virtue of the analysis in the text, OPM regulations would not appear to form an appropriate basis for assertion of jurisdiction under the Tucker Act. *See* 5 U.S.C. §§ 101, 104, 1101. *See generally* 26 Op. Att'y Gen. 209, 210-11 (1907).

to the civil service. This case presents the issue left open by the Court of Claims in *Montalvo* v. *United States*, No. 675-81C, order at 6-7 (Ct. Cl. Sept. 10, 1982) (order granting summary judgment), whether, after passage of the Civil Service Reform Act, a probationary employee may bring an action in this court seeking review of an agency's decision to dismiss him.[3]

The Civil Service Reform Act does not, on its face, allow probationary employees to bring a claim under the Tucker Act. The CSRA merely provides that before receiving a permanent appointment, employees will serve a probationary period, subject to the President's broad power to regulate the terms and conditions of probationary employment. 5 U.S.C. § 3321(a).[4] The absence of an express statutory provision does not, however, automatically foreclose jurisdiction under the Tucker Act. Decisions of the Court of Claims have left open the possibility that jurisdiction may be based upon legislation which "can fairly be interpreted as mandating compensation by the Federal Government." *Eastport Steamship Corp.* v. *United States*, 178 Ct. Cl. 599, 607 (1967).

Although the *Eastport Steamship* standard has been frequently cited by the Court of Claims, *e.g.*, *Barber* v. *United States*, 230 Ct. Cl. ____, ____, 676 F.2d 651, 654 (1982); *Duncan* v. *United States*, 299 Ct. Cl. ____, ____, 667 F.2d 36, 47 (1981); *Adair* v. *United States*, 227 Ct. Cl. ____, ____, 648 F.2d 1318, 1322 (1981), the cases provide little guidance as to what methodology to follow in determining whether a statute may fairly be interpreted as creating a right to proceed under the Tucker Act. Fortunately, the applicable principles have been

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[3] In *Montalvo* the issue was considered by an in-chambers panel during the last month of the Court of Claims' existence. The court wisely felt that resolution of such an important question should be reserved for a determination based upon full oral argument before the new Federal Circuit which would have appellate jurisdiction over all matters under the CSRA. Order at 6-7. This court does not read this ruling as precluding consideration of the issue but, rather, as an invitation to treat the matter with the care and deliberation it deserves.

[4] This absence of an express statutory entitlement stands in sharp contrast to other provisions pertaining to the civil service, *e.g.*, 5 U.S.C. §§ 8715, 8912, which clearly evince a congressional intent that this court have jurisdiction.

comprehensively set forth by the Supreme Court in a line of cases starting with *Cort* v. *Ash*, 422 U.S. 66 (1975).

Cort v. *Ash* and its progeny deal with the question of when statutes implicitly create private rights of action. The cases deal with situations where Congress has created certain rights or benefits, but has failed to expressly authorize the federal courts to entertain actions by the beneficiaries to enforce those rights.[5]

Cort establishes a four-part test to determine whether a right of action may be inferred:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," *Texas & Pacific R. Co.* v. *Rigsby*, 241 U.S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, *e.g.*, *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U.S. 453, 458, 460 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, *e.g.*, *Amtrak*, *supra*; *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 423 (1975); *Calhoon* v. *Harvey*, 379 U.S. 134 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action solely on federal law?

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[5] The *Cort* v. *Ash* line of cases points out the subtle but important distinction between congressional intent to create a substantive entitlement and the intent to create a right to enforce that entitlement by suit in federal court. Congress frequently creates entitlements which it entrusts wholly to the administrative process. *See* p. 12 & n. 8 *infra*. In determining whether suit may be brought under 28 U.S.C. § 1491, the court must therefore be careful to determine not only whether Congress intended that the plaintiff be the beneficiary of an entitlement, but also whether it intended that he be able to enforce such entitlement by suit for money damages in this court. *See United States* v. *Testan*, 424 U.S. at 400-02.

422 U.S. at 78. Naturally, in a case such as this, involving the federal employment relationship which is created wholly by federal statute, only the first three of the *Cort* factors have relevance.

Over the years, the Court has clarified the *Cort* v. *Ash* test. Thus, in *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575-76 (1979), the Court noted that the factors are not all entitled to equal weight:

> The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose, see 422 U.S., at 78—are ones traditionally relied upon in determining legislative intent.

The *Cort* test has, moreover, proved to be a stringent one and the Court has not lightly inferred congressional intent to create a private right of action. *See, e.g., Jackson Transit Authority* v. *Local 1285, Amalgamated Transit Union*, ____ U.S. ____, 50 U.S.L.W. 4603 (June 8, 1982); *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *California* v. *Sierra Club*, 451 U.S. 287 (1981); *Chrysler Corp.* v. *Brown*, 411 U.S. 281 (1979); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978); *Piper* v. *Chris-Craft Industries*, 430 U.S. 1 (1977).

B.

The CSRA is the first major revamping of the federal service since its creation by the Pendelton Act of 1883, almost a century earlier. The Act was passed in response to persistent criticisms of the civil service. While it addressed a multitude of problems, two goals were viewed as paramount: (1) to define precisely and comprehensively the rights of federal employees and the principles under which the federal merit system would operate; and (2) to facilitate and expedite the process of dealing with unsatis-

factory employees by broadening the authority of federal managers and by streamlining the administrative and judicial review process. To achieve these goals, the multitude of laws governing the civil service, haphazardly enacted over the years,* were carefully reviewed and amended by the Act.

The move for reform began in June 1977 when President Carter established the Personnel Management Project under the direction of Dwight Ink. The project took five months to complete and involved 110 employees who staffed nine different task forces. Seventeen public hearings were held throughout the United States and approximately 7,000 individuals and 800 organizations participated in the consultation process. *See* S. Rep. No. 969, 95th Cong., 2d Sess. 13 (1978). When the project was completed, Mr. Ink could justly claim that this was "the most comprehensive review of the Federal civil service system ever undertaken." Letter from Dwight Ink to Allan K. Campbell, Chairman of the Civil Service Commission (Dec. 20, 1977), *reprinted in* 1 The President's Reorganization Project, Final Staff Report, before Table of Contents (December 1977) (the "Ink Report").

The project report, which comprises three volumes and almost a thousand pages, made numerous recommendations for reform. While the recommendations covered many areas, they were all designed to "help restore an appropriate balance between [the] sometimes competing needs for flexibility and efficiency on the one hand, and adequate safeguards on the other, in order to foster effective, fair management in the Federal Government." 1 Ink Report vii.

On the basis of the Ink Report, the President developed a legislative proposal which was submitted to Congress in March

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* *See, e.g.*, Civil Service (Pendleton) Act of 1883, ch. 27, 22 Stat. 403; Tenure of Office Act, ch. 154, 14 Stat. 430 (1867); Lloyd-LaFollette Act, ch. 389, § 6, 37 Stat. 555 (1912); Civil Service Retirement Act of 1930, ch. 349, 46 Stat. 468; Hatch Political Activity Act, ch. 410, 53 Stat. 387; Government Employees' Incentive Awards Act, ch. 1208, §§ 301-307, 68 Stat. 1105, 1112-14 (1954); Government Employees' Training Act, Pub. L. No. 85-507, 72 Stat. 327 (1958); Dual Compensation Act, Pub. L. No. 88-448, 78 Stat. 484 (1964); Back Pay Act of 1966, Pub. L. No. 89-380, 80 Stat. 94; Federal Pay Comparability Act of 1970, Pub. L. No. 91-656, 84 Stat. 1946 (1971).

of 1978 as S. 2640. In his transmittal letter, the President stressed that the proposal, which was to be "the centerpiece of government reorganization during [his] term in office," was designed to correct the "bureaucratic maze which neglects merit, tolerates poor performance, permits abuse of legitimate employee rights, and mires every personnel action in red tape, delay and confusion." President's Message to Congress transmitting draft legislation, Mar. 2, 1978, *reprinted in* H.R. Doc. No. 299, 95th Cong., 2d Sess. 622 (1978).

While giving due consideration to the Ink Report and the President's recommendations, both Houses of Congress undertook independent and detailed examinations of the civil service system and the need for reform. The Senate Committee on Governmental Affairs held 12 days of public hearings, receiving testimony from 86 witnesses representing 55 organizations. *See* S. Rep. No. 969, *supra*, at 1–2. Senator Percy held four additional days of informal field hearings. *Hearings on S. 2640, S. 2707 and S. 2839 Before the Committee on Governmental Affairs*, 95th Cong., 2d Sess. (1978) (Appendix). Written responses were also received from 69 individuals and organizations. *Id.* The House held 13 days of hearings (six of those on location at various departments and agencies) and received the testimony of over 140 witnesses. In addition, written statements were received from 36 individuals and organizations. *Hearings on H.R. 11280 Before the Committee on Post Office and Civil Service*, 95th Cong., 2d Sess. (1978).

Subsequent to these hearings, the bills underwent five separate markup sessions in the Senate and ten in the House. Committee on Governmental Affairs, United States Senate, *Markup Session on S. 2640, Civil Service Reform Act of 1978* (unpublished transcript of May 22, June 7, 8, 12, 14, 1978); Committee on Post Office and Civil Service, U.S. House of Representatives, 95th Cong., 2d Sess., *Markup Meetings on H.R. 11280, A Bill to Reform the Civil Service Laws* (1978). The Committees produced lengthy reports which contained numerous separate and dissenting views. *See* S. Rep. Nos. 969, 1049, 95th Cong., 2d Sess. (1978); H.R. Rep. Nos. 920, 1396, 1403, 95th Cong., 2d Sess. (1978). The legislation was debated for six

days on the House floor and for two days on the Senate floor. The combined legislative history (excluding the Ink Report) takes up almost 6,000 pages.

A careful review of this background to the Civil Service Reform Act leads to the inescapable conclusion that all participants considered the Act to be a comprehensive reorganization of the civil service system. *See, e.g.*, President's Message to Congress, Mar. 2, 1978, *supra*, at 623; President's Message to Congress transmitting Reorganization Plan No. 2, May 23, 1978, *reprinted in* H.R. Doc. No. 341, 95th Cong., 2d Sess. 630, 631 (1978); 124 Cong. Rec. S14282 (daily ed. Aug. 24, 1978) (statement of Sen. Javits); 124 Cong. Rec. S17082–83 (daily ed. Oct. 4, 1978) (statement of Sen. Ribicoff); 124 Cong. Rec. H8462 (daily ed. Aug. 11, 1978) (statement of Rep. Udall); *Hearings on S. 2640. S. 2707 and S. 2830, supra*, at 59 (statement of James T. McIntyre, Jr., Director of OMB) (April 6, 1978).

When finally written into law, the CSRA introduced a number of concepts and procedures which were radically different from prior law. *E.g.*, 5 U.S.C. §§ 2301–05 (enumeration of merit system principles and prohibited personnel practices); 5 U.S.C. §§ 3131–3597 (establishment of the Senior Executive Service). In other respects, the law was changed only slightly or was left totally unchanged. *E.g.*, 5 U.S.C. §§ 7321–27 (restrictions on employees' right to engage in political activities). However, it is clear that the Act as finally passed constituted a delicate balance between a multitude of competing interests and a carefully drawn compromise between sharply divergent views as to what rights ought to be afforded federal employees and how much leeway should be given supervisors in implementing personnel management policies.

In light of this history, the court must be exceedingly careful in interpreting the Act so as not to import into its painstakingly crafted scheme, procedures and remedies unintended by the Act's drafters and inconsistent with the balance it establishes. *Cf. Brown* v. *GSA*, 425 U.S. 820 (1976) (interpreting Title VII of Civil Rights Act as comprehensive scheme to redress federal employment discrimination).

C.

1. The court is persuaded that plaintiff is within the class of individuals for whose especial benefit the CSRA was enacted. *Cort*, 422 U.S. at 78. While the Act was designed to meet several competing goals, *see* pp. 8–10 *supra*, there can be little doubt that the rights and status of federal employees were seriously considered by the Congress and that substantial thought was given to securing those rights through mechanisms in the CSRA. While probationers constitute a subclass of the larger class of federal employees, they are not unintended or incidental beneficiaries of the Act. It therefore follows that the first test of *Cort* is met.

2. Plaintiff's claim fares considerably less well under the second test of *Cort*. 422 U.S. at 78. The statute and its legislative history reveal no congressional intent to grant probationers the right to a judicial remedy for dismissal. Indeed, there is much to suggest the contrary.

While treating probationary employees like other employees for most purposes, *see, e.g.*, 5 U.S.C. § 4301(2), the Act draws a sharp distinction in the treatment of these employees when they become the subject of an adverse action—a suspension, removal or reduction in grade. While tenured employees are afforded a panoply of rights for the more serious of these actions, including the right to 30 days' notice, to answer charges, to be represented by an attorney, to a written decision and ultimately to an appeal to the Merit Systems Protection Board, 5 U.S.C. § 7513, probationary employees are pointedly excluded. *Id.* § 7511(a)(1)(A). *See Hernandez* v. *Department of the Treasury*, No. 3-81, slip op. at 3 (Ct. Cl. Feb. 26, 1982); *Budnick* v. *MSPB*, 643 F.2d 278, 279 (5th Cir. 1981). Probationary employees are denied even the more limited rights afforded tenured employees who suffer suspensions for 14 days or less. 5 U.S.C. § 7501 (1980).

This limitation on the rights of probationary employees was not an oversight; it was a conscious decision by Congress to afford federal managers great latitude in removing probationary employees before they become vested with the rights afforded

tenured employees. *See* H.R. Rep. No. 1403, 95th Cong., 2d Sess. 21 (1978); *Borrell* v. *ICA*, 682 F.2d 981, 987-88 (D.C. Cir. 1982). Indeed, Congress viewed the probationary period as "an extension of the examining process to determine an employee's ability to actually perform the duties of the position." S. Rep. No. 969, *supra*, at 45. Thus, under the Act as elucidated by its legislative history, probationary employees appear to have rights no greater than those of applicants for federal employment; these rights cannot form a basis for suit in this court under 28 U.S.C. § 1491.

3. The third *Cort* test is whether it is consistent with the legislative purpose to infer a right of probationary employees to bring an action in this court. 422 U.S. at 78. It clearly appears not.

To hold that probationary employees may obtain direct judicial review of agency actions would stand the carefully drawn statutory scheme on its head and undermine one of the principal purpose of the CSRA—to enable federal managers to exclude unsuitable employees from the federal workforce. In establishing the Merit Systems Protection Board, Congress created a system whereby personnel actions which are to be reviewed outside the employing agency are first considered within the executive branch and reach the federal courts at the appellate level on the basis of the administrative record. 5 U.S.C. § 7503. These protections are afforded to tenured employees. It would be totally anomalous for Congress to have afforded probationary employees greater rights by entitling them to a judicial trial while affording tenured employees only a hearing before an MSPB presiding official.

To be sure, Congress did expect that, in deciding whether to terminate a probationary employee, agency managers exercise a good faith judgment. This does not, however, translate into a right to judicial review of that decision.[7] As with the great

[7] The Supreme Court in *Testan* specifically rejected the argument that jurisdiction must be inferred whenever a violation is alleged because a party might otherwise have a right without a remedy enforceable in this court. 424 U.S. at 401-02. *See also United States* v. *Erika, Inc.*, 50 U.S.L.W. 4399 (U.S. Apr. 20, 1982) (no rightt to judicial review of the amount of Medicare Part B benefits).

majority of decisions made by officers of the federal government, the principal guarantee of propriety and lawfulness lies in the acting official's good faith and honesty which are, of course, presumed.[8] *See INS* v. *Miranda*, 51 U.S.L.W. 3358, 3359 (U.S. Nov. 9, 1982) (per curiam); *Staskus* v. *United States*, 2 USCCR No. 27, at 4, 8 (Dec. 10, 1982) (LYDON, J.). *See generally*, *Sanders* v. *United States*, 219 Ct. Cl. 285, 302 (1979) & cases cited therein. Doubtless, errors or abuses may still occur.[9] But the judicial review process can introduce abuses of its own. Exposing the personnel decision-making process to judicial scrutiny—and the panoply of procedures and delays associated therewith—undermines its integrity by increasing the likelihood that managers will refrain from terminating employees during probation even when they think it appropriate to do so.

This burden on managerial decision making would be far from insignificant. Tens of thousands of employees are given probationary appointments each year, and a significant number of them are terminated during the probationary period. *See generally* Office of Personnel Management, Personnel Agency Counts (PAC) Reports (FY 1981). The prospect of litigation in this court as to even a portion of those terminations could undermine the function of the probationary period as an integral part of the examining process, when supervisors are meant to exercise broad discretion in determining the applicant's suitability for the position. *See* p. 11 *supra*.[10]

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[8] Indeed, the CSRA itself provides numerous procedures which quite clearly are relegated to an agency's unreviewable discretion. *See, e.g.*, 5 U.S.C. §§ 7501-03 (suspensions for 14 days or less); *id.* § 3592 (removals from the Senior Executive Service). *See also Borrell* v. *ICA*, 682 F.2d at 988 (decision of Special Counsel of the Merit Systems Protection Board whether to bring corrective action is not judicially reviewable).

[9] Judicial review does not, in any case, guarantee that all errors will be corrected. Even criminal proceedings, heavily weighted to resolve all doubts in favor of the accused, occasionally result in incorrect guilty verdicts. *See, e.g.*, *Pardon Based on Innocence*, Washington Post, October 28, 1981, at A3, col. e. *See also* 28 U.S.C. § 1495 (authority of this court to entertain action by individuals unjustly convicted and confined).

[10] This case is illustrative. Even though still in its early stages, three depositions have been taken, covering over 230 pages of transcript. Plaintiff's immediate supervisor, Ms. Pervarnik, testified for 4 hours; Mr. Baker the postmaster, testified for 2 hours and 45 minutes over a period of two days. It

The Act's drafters were acutely aware that the fear of protracted litigation can be a strong deterrent to federal managers wanting to impose needed discipline, and one of the major purposes of the CSRA was to eliminate or minimize this deterrent. *See, e.g.*, Ink Report, *supra*, at 5, 40, 52; S. Rep. No. 969, *supra*, at 9, 24, 40; President's Message to Congress, Mar. 2, 1978, *supra*, at 625-26; 124 Cong. Rec. S14312 (daily ed. Aug. 24, 1978) (statements of Senators Bellmon and Ribicoff); *Hearings on H.R. 111280*, *supra*, at 55-56 (statement of Hon. Joseph Califano, Secretary of HEW); Markup Meetings on H.R. 11280, *supra*, at 97 (statement of Rep. Udall).

Only Congress can determine the appropriate balance between the rights of employees and the prerogatives of managers. The federal courts in general, and this court in particular, *see* p. 2 *supra*, must be exceedingly careful not to substitute their judgment by presuming that judicial review must have been intended. *See United States* v. *Testan*, 424 U.S. at 399-400. Here Congress appears to have made a clear choice: it created no rights under the CSRA which could form the basis for an action by probationers under 28 U.S.C. § 1491. Moreover, one house of Congress expressly admonished that "[i]t is inappropriate to restrict an agency's authority to separate an employee who does not perform acceptably during [the probationary] period." S.Rep No. 969, *supra*, at 45. This is a clear statement that an agency's discretion is not to be made subject to administrative or judicial review.

D.

Plaintiff, however, points to a line of Court of Claims cases which holds that the court has authority to review probationary employee dismissals under either an "arbitrary and capricious" standard, *e.g.*, *Greenway* v. *United States*, 163 Ct. Cl. 72 (1963), or to determine whether agency officials exercised an "honest judgment," *e.g.*, *Perlongo* v. *United States*, 215 Ct. Cl. 982

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is not unlikely that, remembering the delay, inconvenience and inherently intimidating atmosphere of these depositions, these supervisors may become more reluctant to dismiss probationary employees in the future.

(1977).[11] These cases were decided, however, before the effective date of the Civil Service Reform Act. As demonstrated, the Act constitutes a complete overhaul of the civil service system and of the rights of federal employees. Since the cited cases were decided under prior law, they constitute merely persuasive authority. *See Piskadlo* v. *Veterans' Administration*, 668 F.2d 82, 84 (1st Cir. 1982) (Davis, J., by designation) (explicitly recognizing that the *Greenway-Perlongo* line of cases must be reappraised in light of the CSRA).

The Court of Claims decided these cases in the context of the pre-CSRA situation which was described as "an outdated patchwork of statutes and rules," S. Rep. No. 969, *supra*, at 3, and a "welter of inflexible strictures that have developed over the years [and] threaten to asphyxiate the merit principle itself." *Id.* While good reason may then have existed for inferring a congressional grant of jurisdiction to review dismissals of probationary employees, no such basis exists after Congress has carefully and comprehensively reviewed and catalogued employee rights in the CSRA.[12] In any case, the Court of Claims itself expressly left the issue open in *Montalvo* v. *United States*, No. 675-81C, *supra*.

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[11] Defendant suggests that these cases were wrongly decided and, apparently, invites the court to overrule them. While the United States Claims Court is not of necessity bound by the precedents set by the United States Court of Claims, the judges of this court have determined that prudential considerations make it appropriate to give Court of Claims precedents full force and effect. General Order No. 1, ___ F. Supp. ___ (1982). *See South Louisiana Grain Services, Inc.* v. *United States*, 1 USCCR No. 17, at 11 (Nov. 2, 1982) (LYDON, J.). Thus, this court is not authorized to overrule precedents of the Court of Claims.

[12] In the extensive legislative history of the CSRA there is no hint that Congress was aware of the handful of cases holding that Court of Claims review of probationary employee dismissals was appropriate. Therefore, it cannot be inferred that Congress acquiesced in the practice. *See Helvering* v. *Hallock*, 309 U.S. 106, 119-21 (1940); *cf. United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979).

III. *The Constitution*

A.

At oral argument, counsel for plaintiff asserted the first amendment as a basis for jurisdiction.[13] He suggested that plaintiff was fired in retaliation for complaints he had made about the absence of safety procedures. *See* p. 2 *supra;* Complaint ¶ 34. Because neither party had addressed this question, the court requested supplemental briefs to assist it in resolving what appears to be a troublesome issue. Order of November 3, 1982.

The Court of Claims has generally taken a very restrictive view as to when a constitutional provision can form the basis for suit under the Tucker Act. The rule has been that to form the basis for jurisdiction, "the constitutional provision [must] in itself obligate the Federal Government to pay money damages." *Walton* v. *United States*, 213 Ct. Cl. 755, 757 (1977). Traditionally, the only constitutional provision construed as mandating compensation has been the taking clause of the fifth amendment, *Clark* v. *United States*, No. 658-80C, order at 8 (Ct. Cl. Nov. 6, 1981), the court having consistently rejected such other provisions as the due process and equal protection clauses. *See, e.g., Inupiat Community of the Arctic Slope* v. *United States*, 231 Ct. Cl. ____, ____, 680 F.2d 122, 132 (1982); *Walton* v. *United States*, 213 Ct. Cl. at 757 (1977); *Muehlen* v. *United States*, 209 Ct. Cl. 690 (1976).

The Court of Claims' treatment of the first amendment as a basis for jurisdiction has been less consistent. On the one hand, in *Featheringill* v. *United States*, 217 Ct. Cl. 24, 33 (1978), the court held that "the First Amendment . . . no more mandates the payment of money than does the due process clause and, thus, may not serve as a jurisdictional basis for plaintiff's law suit." *Accord Clark*, No. 658-80C, *supra*. On the other hand, in *Jackson* v. *United States*, 192 Ct. Cl. 765, 768 (1970), the court held that a probationary employee's claim that he was discharged in retaliation for the exercise of first amendment rights was " 'founded upon the constitution' of which we have jurisdic-

[13] Plaintiff also suggested that jurisdiction might be based on the fifth amendment but has since withdrawn that claim.

tion by virtue of 29 U.S.C. 1491(1). . . ." *Accord Bowman* v. *United States*, No. 577-79C, order at 2 (Ct. Cl. Mar. 6, 1981).

Featheringill, decided some eight years after *Jackson*, recognized the tension with that earlier decision and sought to distinguish it. The plaintiff in *Featheringill* had received a temporary appointment which expired, by its own terms, after one year. Plaintiff argued that the government's failure to reappoint him was motivated by retaliation for the exercise of his rights under the first amendment. 217 Ct. Cl. at 26-27. After rejecting plaintiff's argument that jurisdiction was based upon the Back Pay Act, 5 U.S.C. § 5596, 217 Ct. Cl. at 27-32, the court turned to the first amendment. It assumed, for purposes of the decision, that plaintiff had stated a valid claim of retaliation under the first amendment, a claim which could form the basis for relief if jurisdiction were established. The court nevertheless concluded that "even where a substantive right may exist, such a right does not of necessity mean that money damages are available [in the Court of Claims] to redress its possible violation." *Id.* at 32. As noted earlier, the court held that the amendment could not form a basis for jurisdiction under the Tucker Act and therefore dismissed the action.

The *Featheringill* court distinguished *Jackson* in a single paragraph, noting that *Jackson* had involved a dismissal while the case before it involved a failure to reappoint. The court reasoned that in the non-reappointment situation the employee had no entitlement to the job whereas, presumably, the probationary employee in *Jackson* had some expectation of continued employment. The distinction now appears unpersuasive on at least two grounds.

First, an employee's expectations of continued employment under the civil service laws would seem to have no bearing on whether the first amendment is a money mandating provision which can form the basis for jurisdiction under the Tucker Act. Once it is concluded that the first amendment does not mandate the payment of money, it is difficult to see how that conclusion can be altered by any expectations the plaintiff may have arising from statutes or regulations governing the terms of his employment.

Second, the notion that probationary employees have rights greater than those of limited term employees has been seriously undermined by the Civil Service Reform Act. As discussed earlier, under the CSRA probationary employees were intended to have rights no greater than those of applicants for employment since the probationary period is considered to be merely an extension of the employment examination process. *See* p. 11 *supra*. Thus, whatever basis may have existed for distinguishing *Jackson* at the time of *Featheringill* has now been eroded by enactment of the CSRA.

Despite the apparently irreconcilable tension between *Featheringill* and *Jackson*, the Court of Claims treated both lines of cases as good law to the end. *Compare Clark* v. *United States*, No. 658-80C, *supra*, at 8, *and Mullins* v. *United States*, No. 240-81C, order at 3 (Ct. Cl. Oct. 30, 1981) (cases relying on *Featheringill*); *with Cole* v. *United States*, 231 Ct. Cl. ____, ____, 689 F.2d 1040, 1041 (1982) *and Bowman* v. *United States*, No. 577-79C, *supra*, at 2 (cases relying on *Jackson*).

While it appears difficult to reconcile these two lines of case, this court is without authority to choose between them. Under our General Order No. 1, *see* n.11 *supra*, the court is bound to respect and follow precedents established by the Court of Claims "unless and until modified by decisions of the United States Court of Appeals for the Federal Circuit or the United States Supreme Court." *See also Federal Deposit Ins. Corp.* v. *Fagan*, 459 F. Supp. 933, 935 (D.S.C. 1978); *Lakeside Community Hospital* v. *Tahoe Regional Planning Agency*, 461 F. Supp. 1150, 1153 (D. Nev. 1978). While it may, of course, reexamine those decisions which have lost vitality because of changes in the statutes they were interpreting, *see* p. 14 *supra*, the court is bound to respect *Featheringill*'s decision to leave *Jackson* unimpaired, albeit confined to its facts. Because this case involves the dismissal of a probationary employee, as in *Jackson*, the court concludes that it has jurisdiction over that portion of plaintiff's claim which is based upon the first amendment.[14]

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[14] The position taken by defendant in its brief on the issue is somewhat unclear. In one portion of its brief, it appears to concede the court's jurisdiction, in general, to entertain first amendment claims of probationary employees, subject to certain prudential limitations. *See* Def. Supp. Mem. Concerning

B.

While the court considers its conclusion inevitable under the law as left by the Court of Claims, it believes the issue to be ripe for consideration by the Court of Appeals for the Federal Circuit. As of October 1, 1982, that court has jurisdiction over all appeals from the Merit Systems Protection Board and will consider the lion's share of post-CSRA federal employment cases. The Federal Circuit thus has the authority, as well as the expertise and breadth of vision, to decide whether *Featheringill* and *Jackson* can continue to coexist after the passage of the CSRA, and, if not, which case shall survive. Guidance on this issue would be welcomed by this court.

Because the court is of the view that this issue of jurisdiction over plaintiff's first amendment claim involves a controlling question of law with respect to which there is substantial ground for difference of opinion, and that resolution of this question would materially advance the ultimate termination of the litigation, the court certifies the issue pursuant to 28 U.S.C. § 1292(d)(2), should defendant seek an interlocutory appeal under that section.

CONCLUSION

The court grants defendant's motion in part, finding a lack of jurisdiction over plaintiff's claim insofar as it is based upon an Act of Congress or a regulation of an executive department. The court denies plaintiff's motion for summary judgment. The court concludes that it has jurisdiction over that portion of plaintiff's

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Juris. 10-12. In other portions of the same brief, defendant appears to argue that jurisdiction could not, after all, be based upon the first amendment, but that the first amendment could only be considered once jurisdiction had been otherwise established. *Id.* at 12-14.

In light of the somewhat contradictory state of the law, this lack of consistency is perhaps understandable. Nevertheless, even if one were to view defendant's argument as conceding jurisdiction, it would not be binding on the court since the parties may not, by argument or estoppel, confer upon the court jurisdiction not granted by Congress. ***Indian Wells Valley Metal Trades Council*** v. ***United States***, 2 USCCR No. 9, at 6 (Nov. 24, 1982) (WIESE, J.).

claim which is based upon allegations that the dismissal was taken in retaliation for the exercise of first amendment rights, but certifies this issue for possible interlocutory appeal.

Within 20 days, defendant shall file with the court an answer to those portions of plaintiff's complaint not rendered moot by this opinion or, in the alternative, a motion for stay of proceedings pursuant to 28 U.S.C. § 1292(d)(3) based upon counsel's representation that application for an interlocutory appeal has been filed in a timely fashion with the court of appeals.

IT IS SO ORDERED.

December 15, 1982.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

THE UNITED STATES,

Appellant,

v.

PATRICK J. CONNOLLY,

Appellee.

Appeal No. 83-651

DECIDED: September 6, 1983

Before MARKEY, *Chief Judge*, FRIEDMAN, RICH, DAVIS, NICHOLS, BALDWIN, KASHIWA, BENNETT, MILLER, SMITH and NIES, *Circuit Judges*.

DAVIS, *Circuit Judge*.

This case comes to us on interlocutory appeal from a decision of the United States Claims Court pursuant to § 125(b) of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, 36-37 (1982) (codified at 28 U.S.C. § 1292(d)(2)).[1]

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[1] The relevant portion of 28 U.S.C. § 1292 provides:

(d)(2) When any judge of the United States Claims Court, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

The language of § 1292(d)(2) is virtually identical to 28 U.S.C. § 1292(b) (1976), which governs interlocutory review by other courts of appeals. That subsection provides, in pertinent part:

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order. . . .

The trial judge granted the government's motion to dismiss appellee's wrongful removal action in part, but denied the government's full motion for judgment. The court held that it possessed jurisdiction "over that portion of [appellee's] claim . . . based upon allegations that the dismissal was taken in retaliation for the exercise of first amendment rights." *Connolly v. United States*, 1 Cl. Ct. 312, 323, F. Supp. 1250, 1262 (1982). Finding the first amendment claim "ripe for consideration" by this court, the Claims Court certified the question of its jurisdiction over the first amendment claim to us. This court has granted interlocutory review. Because we now conclude that the Claims Court is without jurisdiction to entertain wrongful removal actions by probationary employees of the Postal Service—whether or not such claims involved first amendment allegations—we affirm in part and reverse in part.

I

Appellee Connolly commenced employment as a probationary employee of the United States Postal Service (USPS) on April 4, 1981, at the Flagstaff, Arizona, post office. Serving as a postal clerk, his tasks included, among other things, mail sorting and the lifting of heavy cages containing parcel post packages. One month after Connolly began his service at USPS, he received an initial performance evaluation from his supervisor. That evaluation assessed appellee's productivity as "unsatisfactory," and it characterized him as an individual who did not accept criticism gracefully. The supervisor noted, however, that appellee's attitude toward criticism had improved somewhat since his hiring.

In the meantime, Connolly began to experience severe pain in his forearms and a numbness in his fingers. He consulted a neurologist, who diagnosed his malady as bilateral carpal tunnel syndrome, a condition which the doctor attributed to appellee's duties. Connolly, at the specialist's recommendation, began to wear braces on his arms. He also filed a compensation claim with the Department of Labor. The next day—May 13, 1981—Connolly received a second performance evaluation; it charac-

terized his attitude as unsatisfactory with respect to "productivity and work habits," "safety," and "acceptance of criticism."

On the following day, Connolly submitted a letter to the postmaster at the Flagstaff office, explaining the nature of his injury and recommending safety procedures for lifting and carrying mail. The postmaster returned the letter to him without comment. Later that day, Connolly received a removal notice, separating him for unsatisfactory performance.

Connolly filed a wrongful removal suit in the Court of Claims, seeking reinstatement, back pay, damages, and various other forms of relief. He alleged that his poor performance evaluations and resulting dismissal were motivated by his injury, his compensation claim, and his grievances about the lack of proper safety procedures. The government filed a motion for summary judgment, contending that the Civil Service Reform Act of 1978 precluded probationary employees such as appellee from filing wrongful removal actions in the then Court of Claims.[2] Treating the government's motion as a motion to dismiss the complaint, the trial court dismissed that part of plaintiff's complaint based upon statutory and regulatory provisions. The court held that it had no jurisdiction over appellee's claims because alleged violations of Postal Service regulations "cannot form the basis for jurisdiction in [the Claims Court]," and because the Civil Service Reform Act of 1978 effectively bars judicial review of an agency's dismissal of a probationary employee. *Connolly* v. *United States*, *supra*, 1 Cl. Ct. at 314-21, 554 F. Supp. at 1254-60.

However, the trial judge denied the government's motion insofar as it suggested that the first amendment[3] did not provide the court with jurisdiction over the appellee's claim. In review-

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[2] Both parties filed cross-motions for summary judgment in the Court of Claims prior to October 1, 1982, the effective date of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. The case was transferred to the United States Claims Court on that date.

[3] U.S. Const. amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ing Court of Claims precedent on the question of whether the first amendment may serve as a basis for jurisdiction, the court discerned an "irreconcilable tension" between *Featheringill* v. *United States*, 217 Ct. Cl. 24 (1978) and *Jackson* v. *United States*, 192 Ct. Cl. 765, 428 F.2d 844 (1970). The court concluded that it possessed "jurisdiction over that portion of [appellee's] claim which is based upon the first amendment," *Connolly*, *supra*, 1 Cl. Ct. at 323, 554 F. Supp. at 1261, and certified that issue to this court for review.

II

At the outset we note that our action on this appeal is not circumscribed by the terms of the trial court's certification. Section 1292(d)(2), like its counterpart § 1292(b), *see supra* note 1, permits interlocutory appeals from trial court *orders* involving, to some extent, a controlling question of law which is the subject of certification. *See, e.g., Nuclear Engineering Co.* v. *Scott*, 660 F.2d 241, 276 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982); *Consolidated Express, Inc.* v. *New York Shipping Association*, 602 F.2d 494, 502 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980); *Dyke* v. *Gulf Oil Corp.*, 601 F.2d 557, 559 n.3 (Temp. Emer. Ct. App. 1979); *Johnson* v. *Alldredge*, 488 F.2d 820, 822-23 (3d Cir. 1973), *cert. denied*, 419 U.S. 882 (1974). Both sections require the courts of appeals to decide *appeals* from trial court *orders*, not merely the particular question certified. *Bersch* v. *Drexel Firestone, Inc.* 519 F.2d 974, 994 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1976); *Johnson*, *supra*, 488 F.2d at 823.

The legislative history underlying § 1292(b) makes it especially clear that a full consideration of all issues material to an interlocutory order is necessary on appeal when—as here—the question arises in the procedural posture of a motion to dismiss the case for lack of jurisdiction. If, upon trial court certification, the court of appeals determines that jurisdiction is lacking (whether or not on the certified ground), interlocutory review saves considerable time and expense on behalf of both courts and litigants. S. Rep. No. 2434, 85th Cong., 2d Sess. 2, *re-*

printed in 1958 U.S. Code Cong. & Ad. News 5255, 5256. Because the language of § 1292(d)(2) so closely tracks that of § 1292(b), *see supra* note 1, the latter's legislative history is persuasive with respect to § 1292(d)(2).

We hold, then, that the nature and scope of our review are not limited to the certified question but that we are free to consider all questions material to the trial court's order sustaining its jurisdiction. *Nuclear Engineering, supra*, 660 F.2d at 246; In re *Oil Spill by the Amoco Cadiz*, 659 F.2d 789, 793, n.5 (7th Cir. 1981); *Consolidated Express, supra*, 602 F.2d at 502, *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974). We therefore proceed to consider whether the Claims Court may entertain appellee's wrongful removal action on any jurisdictional basis.

III

The trial court correctly held that it was without jurisdiction to review appellee's dismissal based upon allegations of regulatory or statutory violations. It is now settled that the Tucker Act does not itself confer a substantive right of recovery; rather, the prospective claimant must invoke substantive rights grounded expressly or by implication in a contract, an act of Congress or a regulation of an executive department. *See United States* v. *Mitchell*, 51 U.S.L.W. 4999, 5002 & n.16 (U.S. June 17, 1983); *Eastport Steamship Corp.* v. *United States*, 178 Ct. Cl. 599, 605, 607, 372 F.2d 1002, 1007, 1009 (1967).

Appellee, as a probationary employee of the Postal Service, cannot rely on alleged violations of Postal Service regulations and the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978), as the substantive bases for his suit. Even if we assume *arguendo* that the Postal Service failed to comply with its own regulations in ordering appellee's dismissal, that would not support jurisdiction in the Claims Court. Since the enactment of the Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719 (1970), the Postal Service has not been considered one of the "executive departments" within the meaning of 5 U.S.C. § 101 (1982). *See* Pub. L. No. 91-375, § 6(c), 84

Stat. 719, 775 (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News 842, 911 (repealing that portion of 5 U.S.C. § 101 which designated the Post Office as an executive department).[4] Only the regulations of an "executive department" can form the basis for a regulatory claim cognizable under Tucker Act jurisdiction. *See* 28 U.S.C. § 1491 (Supp. V 1981).

We also agree with the trial judge's conclusion that Connolly, as a probationary employee, has no right under the Civil Service Reform Act to seek review of his dismissal in the Claims Court. The Reform Act established a comprehensive scheme for judicial review of adverse actions but at the same time deliberately precluded such review under that Act for probationary employees. *See INS* v. *FLRA*, No. 82-1622, slip op. at 9-11 (D.C. Cir. June 10, 1983); *Piskadlo* v. *Veterans' Administration*, 668 F.2d 82, 83 & n. 1 (1st Cir. 1982). Civil service employees, as defined by the Act, do not include those serving "probationary or trial" terms of employment. 5 U.S.C. § 7511(a)(1)(A) (1982). The statutory definition of "employee" denotes the only class of civil service workers entitled to procedural and appeal rights provided by the Act. *See* 5 U.S.C. § 7513(b), (d), (e) (1982). On the basis of this explicit legislative exclusion of probationary workers, courts have concluded that probationary employees may not appeal adverse actions under the Act. *See Bush* v. *Lucas*, 51 U.S.L.W. 4752, 4758 n.28 (U.S. June 13, 1983); *INS* v. *FLRA*, *supra*, 709 F.2d at 728; *Piskadlo*, *supra*, 668 F.2d at 83-84 (probationary employees have no statutory right to appeal to Merit Systems Protection Board).[5]

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[4] Congress made it clear in the Postal Reorganization Act of 1970 that the Postal Service was essentially to be separate from the government. *See* H.R. Rep. No. 1104, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News. 3649, 3657, 3661. Indeed, the Act provides that the Postal Service is empowered to sue and be sued in its own name, 39 U.S.C. § 401(1) (1976), and that the district courts have original jurisdiction over virtually all such actions, 39 U.S.C. § 409(a) (1976).

[5] We know of only one possible exception to the rule that probationers have no appeal rights and it does not apply to probationary postal workers. 5 C.F.R. § 315.806(b) accords a limited right of review by the MSPB for civil service probationers alleging improper termination due to partisan political reasons or marital status. *Mastriano* v. *Federal Aviation Administration*, App. No. 83-735 (Fed. Cir. Aug. 23, 1983).

We think that the legislative history of the Reform Act entirely forecloses the possibility that probationary employees have some sort of unspecified private right of action in the Claims Court under the Act to seek judicial review of their removals. The policy of denying probationary employees the right to challenge such terminations was explicitly outlined in the Senate Report accompanying the Act:

> The probationary or trial period . . . is an extension of the examining process to determine an employee's ability to actually perform the duties of the position. It is inappropriate to restrict an agency's authority to separate an employee who does not perform acceptably during this period.

S. Rep. No. 969, 95th Cong., 2d Sess. 45 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723, 2767. *See also id.* at 48, 1978 U.S. Code Cong. & Ad. News at 2770 (procedural protections and appeal rights do not apply to probationary employees.)

Because Congress could have permitted probationers to challenge removals, but expressly declined to do so, we find it incongruous to suppose that appellee has an implied private right of action under the Civil Service Reform Act to seek judicial review of his dismissal. *See INS* v. *FLRA*, *supra*, 709 F.2d at 728. It is the province of other branches, and not the courts, to determine whether probationary employees should be granted the right to judicial review of adverse actions against them. *See Bush*, *supra*, 51 U.S.L.W. at 4758-59. Congress has decided against judicial review in the Reform Act, and we are not free to disturb that judgment.

IV

The trial court wrongly concluded, however, that it possessed jurisdiction over that portion of Connolly's claim which was predicated upon the first amendment. Although we recognize that if "a claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit," *see United*

States v. *Mitchell*, 51 U.S.L.W. 4999, 5002 (U.S. June 27, 1983), the basic issue is whether the first amendment "can fairly be interpreted as mandating compensation for the damages sustained." *See id.*; *United States* v. *Testan*, 424 U.S. 392, 400 (1976); *Featheringill* v. *United States*, 217 Ct. Cl. 24, 32 (1978); *Eastport Steamship Co.* v. *United States*, 178 Ct. Cl. 599, 607, 372 F.2d 1002, 1009 (1967).

We agree with the Court of Claims that the first amendment standing alone, cannot be so interpreted to command the payment of money. *Featheringill*, *supra*, 217 Ct. Cl. at 32-33; *see Clark* v. *United States*, No. 658-80C, slip op. at 7-8 (Ct. Cl. Nov. 6, 1981); *Mullins* v. *United States*, No. 240-81C, slip op. at 3 (Ct. Cl. Oct. 30, 1981). Like the due process clause of the fifth amendment, the literal terms of the first amendment neither explicitly nor implicitly obligate the federal government to pay damages. *See supra* note 3; *Walton* v. *United States*, 213 Ct. Cl. 755, 757 (1977). That amendment merely forbids Congress from enacting certain types of laws; it does not provide persons aggrieved by governmental action with an action for damages in the absence of some other jurisdictional basis. In construing the contours of Tucker Act jurisdiction, it would be, of course, impertinent for us to consider whether appellee may make such a first amendment claim within the non-monetary jurisdiction of a district court, or in a district court suit against the Postal Service. *Featheringill*, *supra*, 217 Ct. Cl. at 32; *Clark*, *supra*, slip. op. at 8.

In his effort to expand Claims Court jurisdiction to encompass claims founded solely upon the first amendment, appellee cites *Jackson* v. *United States*, 192 Ct. Cl. 765, 428, F.2d 844 (1970) and *Swaaley* v. *United States*, 180 Ct. Cl. 1, 376 F.2d 857 (1967). Those cases are quite distinguishable from the one before us. Both *Jackson* and *Swaaley* primarily involved claims for back pay, and the plaintiffs in those cases sought such compensation in accordance with federal pay statutes. Jackson served as a probationary employee of the Department of Agriculture with a GS-9 rating; Swaaley was a WB-11 naval mechanic. Both of those plaintiffs could rely upon pay statutes which provided them with rates of pay, and they had causes of action for back pay under the Tucker Act if such compensation was wrongly

withheld. *See, e.g.*, 5 U.S.C. § 5332(a) (1970) (setting pay schedule for GS employees). Those plaintiffs sought back pay for their allegedly improper removal from positions which they held, and not money damages *per se*. *Accord Cole* v. *United States*, 689 F.2d 1040 (Ct. Cl. 1982). In this light, the Tucker Act jurisdiction of the Court of Claims followed from the pay legislation pertaining to those employees and the latters' invocation of the first amendment formed part of their claims that they had been illegally deprived of their pay. *Cf. Ah Sam* v. *United States*, 682 F.2d 925, 934-35 (Ct. Cl. 1982), *cert. denied*, 103 S.Ct. 786 (1983).

Connolly, in contrast, cannot rely upon a pay statute which mandates the payment of money to him. He was employed by the Postal Service, and the Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719 (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News 842, abrogated the applicability of federal pay statutes to Postal Service employees. *See id.* § 6(c), 84 Stat. 719, 775, 1970 U.S. Code Cong. & Ad. News at 911; *see also* 5 U.S.C. §§ 101, 105, 5102 (1982); *cf. White* v. *Bloomberg*, 501 F.2d 1379, 1381 n.2 (4th Cir. 1974). No comparable money-mandating pay statute exists for Postal Service employees.

Nor can we accept Connolly's contention that the Back Pay Act, 5 U.S.C. § 5596 (1982), provides jurisdiction to hear his first amendment claim. Even assuming that the Back Pay Act is applicable to Postal Service employees[*]—an issue which we do not decide—Connolly has failed to show that his separation from the Postal Service violated any relevant statute or regulation covered by the Tucker Act. *See supra* Part III. The Back Pay Act is merely derivative in application; it is not itself a jurisdictional statute. *Montalvo* v. *United States*, No. 675-81C, slip op. at 3-4 (Ct. Cl. Sept. 10, 1982). We must conclude that, on any

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[*] The Fourth Circuit has determined that the Back Pay Act no longer applies to the Postal Service. *White* v. *Bloomberg*, 501 F.2d 1379, 1381 n.2 (4th Cir. 1974). *See* 5 U.S.C. §§ 101, 104, 105 (1982).

theory, the Claims Court lacks jurisdiction over appellee's first amendment claim.[7]

V

For these reasons, we affirm the trial court's determination that it lacks jurisdiction over appellee's claim to the extent that it is based upon statutes and regulations. We reverse the trial court's ruling that it possessed jurisdiction over appellee's first amendment claim. The case is remanded to the Claims Court with instructions to grant judgment in favor of the government by dismissing appellee's petition for lack of jurisdiction.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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[7] "[O]rdinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable." *Connick* v. *Myers*, 51 U.S.L.W. 4436, 4438 (U.S. Sup. Ct., Apr. 20, 1983).

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No. 83-948

In the Supreme Court of the United States

OCTOBER TERM, 1983

PATRICK J. CONNOLLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-948

PATRICK J. CONNOLLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the United States Claims Court possessed jurisdiction under the Tucker Act to entertain his claim that he had been wrongfully removed, in violation of the First Amendment, from his position as a probationary employee of the United States Postal Service.

1. Petitioner was employed as a postal clerk for approximately six weeks. During that period he received two performance evaluations, both of which included "unsatisfactory" ratings in several areas. After the second such evaluation, he was separated from the Postal Service for unsatisfactory job performance. The separation occurred during his probationary period. Pet. App. A23-A24.

Petitioner then filed this action in the Court of Claims, asserting that his negative evaluations and subsequent dismissal were retaliation for his having filed a claim for compensation for an injury and complaints about a lack of

proper safety procedures. He sought reinstatement, back pay, damages, and correction of records. Pet. App. A2-A3, A23. The case was transferred to the Claims Court when it succeeded to the original jurisdiction of the Court of Claims (see *id.* at A24 n.2).

The Claims Court granted the government's motion for summary judgment on all issues except one (Pet. App. A1-A21). Specifically, the court ruled that petitioner could not base his claim on a contract with the United States (*id.* at A4), on Postal Service regulations (*id.* at A4-A5), or on the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.* (Pet. App. A5-A16). But the Claims Court concluded that it had "jurisdiction over that portion of [petitioner's] claim which is based upon the first amendment" (*id.* at A19 (footnote omitted)).

On an interlocutory appeal (see Pub. L. No. 97-164, § 125, 96 Stat. 36, to be codified at 28 U.S.C. 1292(d)(2)), the court of appeals, hearing the case en banc, unanimously ordered that the complaint be dismissed in its entirety (Pet. App. A22-A31). The court of appeals agreed with the Claims Court that petitioner could not rely on Postal Service regulations (*id.* at A26-A27), because the Tucker Act grants the Claims Court jurisdiction over claims founded on a "regulation of an executive department" (28 U.S.C. 1491) and the Postal Service is not an executive department (see 5 U.S.C. 101; Pub. L. No. 91-375, § 6(c), 84 Stat. 775). The court of appeals then ruled that petitioner had no cause of action under the CSRA because the CSRA "established a comprehensive scheme for judicial review of adverse actions but at the same time deliberately precluded such review under that Act for probationary employees" (Pet. App. A27).

Finally, the court of appeals reversed the Claims Court's holding that it had jurisdiction over petitioner's First Amendment claim. The court of appeals noted that a suit

may be brought under the Tucker Act only on the basis of a constitutional provision that mandates the payment of compensation, and it held that "the first amendment[,] standing alone, cannot be so interpreted to command the payment of money" (Pet. App. A29). Since no statute authorized petitioner's suit seeking money from the United States for an alleged constitutional violation (*id.* at A30), the court of appeals held that the Claims Court could not entertain petitioner's claim that his discharge violated the Constitution. The court of appeals specifically did not "consider whether [petitioner] may make such a first amendment claim within the non-monetary jurisdiction of a district court, or in a district court suit against the Postal Service" instead of against the United States (*id.* at A29).

2. The Tucker Act limits the jurisdiction of the Claims Court to "claim[s] against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States * * *." 28 U.S.C. 1491(a)(1), as added by Pub. L. No. 97-164, § 133(a), 96 Stat. 39. But the Tucker Act "does not create any substantive right enforceable against the United States for money damages." *United States* v. *Testan*, 424 U.S. 392, 398 (1976); see *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980). "A substantive right must be found in some other source of law" (*United States* v. *Mitchell*, No. 81-1748 (June 27, 1983), slip op. 10). Thus, the threshold question is not, as petitioner suggests, whether the CSRA or another statute has "foreclosed judicial review" or "precluded a[] private right of action" (Pet. i, 7); rather, it is whether petitioner has any cause of action to begin with.

a. Petitioner appears to have abandoned any attempt to found his claim on a regulation or a contract. It appears that petitioner continues to assert a statutory cause of action, but he does not identify any statute that gives probationary

Postal Service employees a right to sue the United States for adverse personnel actions.

The CSRA is certainly not such a statute. As both courts below noted, the CSRA reflects a deliberate decision by Congress to withhold procedural protections from probationary employees, with a few exceptions that are not relevant here. See Pet. App. A13-A15, A27-A28; 5 U.S.C. 7501(1) and 7511(a)(1)(A); S. Rep. 95-969, 95th Cong., 2d Sess. 45 (1978) (quoted at Pet. App. A28); *INS* v. *FLRA*, 709 F.2d 724, 728 (D.C. Cir. 1983); *Piskadlo* v. *Veterans' Administration*, 668 F.2d 82 (1st Cir. 1982). See also *Bush* v. *Lucas*, No. 81-469 (June 13, 1983), slip op. 18 n.28.

The CSRA establishes "an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures — administrative and judicial — by which improper action may be redressed" (*Bush* v. *Lucas*, slip op. 18). This Court has repeatedly held that courts should not supplement such a "painstakingly crafted" (Pet. App. A11) remedial scheme by creating additional, implied remedies. See, *e.g.*, *Bush* v. *Lucas, supra*; *Brown* v. *GSA*, 425 U.S. 820, 832-833 (1976); *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1, 19-21 (1981); *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 97 (1981). See also *Borrell* v. *International Communications Agency*, 682 F.2d 981, 985-988 (D.C. Cir. 1982) (refusing to create an implied remedy under the CSRA in favor of a probationary employee).

Moreover, even if the CSRA were interpreted to create a cause of action in favor of some probationary employees, it would be wholly implausible to suggest that it creates such a right in favor of a probationary Postal Service employee. Pursuant to the Postal Reorganization Act and collective bargaining agreements entered into by the Postal Service,

most categories of Postal Service employees are not covered by the CSRA at all.[1] Petitioner could have sought a remedy under the relevant collective bargaining agreement and, possibly, under the National Labor Relations Act (see 39 U.S.C. 1209(a)), but not in a damages action brought directly against the United States on the basis of an implied statutory cause of action.[2]

b. Petitioner also cannot invoke the First Amendment as a basis for Tucker Act jurisdiction. As the court of appeals ruled, it is well settled that the United States may not be sued for damages arising from a constitutional violation unless the constitutional provision itself mandates the payment of money or a statute specifically authorizes such relief. See, *e.g.*, *United States* v. *Mitchell*, slip op. 10-11; *United States* v. *Testan*, 424 U.S. at 400-402; *United States* v. *Mitchell*, 445 U.S. at 538; *Bivens* v. *Six Unknown*

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[1]The Postal Reorganization Act provides that all Postal Service employees except "preference eligible" employees may be excluded from the procedural protections of the CSRA by a collective bargaining agreement. 39 U.S.C. 1005(a)(1) and (2). The Postal Service informs us that its national collective bargaining agreements exclude all non-preference eligible employees from the CSRA. We understand that petitioner was not a preference eligible employee.

[2]Petitioner relies (Pet. 7-8) on a "handful" (Pet. App. A16 n.12) of cases in which, he asserts, the Court of Claims reviewed adverse personnel actions taken against probationary employees. As the Claims Court noted (*id.* at A15-A16), these cases all antedate the CSRA, and it is doubtful that they survive the comprehensive reform of the area effected by the CSRA. Indeed, this line of cases appears to have been based on Civil Service Commission regulations that were superseded by the CSRA. See, *e.g.*, *Perlongo* v. *United States*, 215 Ct. Cl. 982, 983 (1977); *Powers* v. *United States*, 169 Ct. Cl. 626 (1965); *Greenway* v. *United States*, 163 Ct. Cl. 72 (1963). In any event, petitioner appears to have abandoned any claim based on regulations; moreover, none of the cases he cites involved an employee of the Postal Service. We note that the en banc court of appeals, which succeeded to the jurisdiction of the Court of Claims, did not consider these decisions a barrier to dismissing petitioner's complaint.

Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring); *Radin* v. *United States*, 699 F.2d 681, 684-685 & n.8 (4th Cir. 1983); *Laswell* v. *Brown*, 683 F.2d 261, 268 (8th Cir. 1982), cert. denied, No. 82-5574 (Feb. 22, 1983); *Jaffee* v. *United States*, 592 F.2d 712, 717-718 (3d Cir.), cert. denied, 441 U.S. 961 (1979); *Birnbaum* v. *United States*, 588 F.2d 319, 327-328 (2d Cir. 1978); *Norton* v. *United States*, 581 F.2d 390, 393-394 (4th Cir.), cert. denied, 439 U.S. 1003 (1978); *Duarte* v. *United States*, 532 F.2d 850, 852 (2d Cir. 1976).

As the court of appeals noted, the terms of the First Amendment itself do not " 'mandat[e] compensation' " (*United States* v. *Testan*, 424 U.S. at 400 (citation omitted)), and no statute authorizes the payment of money for a violation of the First Amendment in these circumstances.[3] Petitioner appears to suggest (Pet. 12-13) that the Back Pay Act, 5 U.S.C. 5596, requires the payment of compensation for constitutional violations. But as the court of appeals explained (Pet. App. A30), the Back Pay Act alone does not give a federal employee the right to seek damages in court for a violation of the First Amendment, and in any event it is clear that the Back Pay Act no longer applies to Postal Service employees. See *White* v. *Bloomberg*, 501 F.2d 1379, 1381 n.2 (4th Cir. 1974). The Back Pay Act applies to employees of "Executive agenc[ies]" (5 U.S.C. 5596(a)(1) and (b)(1)), and when Congress created the Postal Service it specifically provided that the Postal Service is not an "executive agency." Compare 5 U.S.C. 104 and 105 with 39 U.S.C. 201 and Pub. L. No. 91-375, § 6(c), 84 Stat. 775.

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[3]Petitioner, like the Claims Court, relies on the Court of Claims' decisions in *Jackson* v. *United States*, 428 F.2d 844 (1970), and *Swaaley* v. *United States*, 376 F.2d 857 (1967) (see Pet. 8-12; Pet. App. A17-A20). But the court of appeals, which in any event could have overruled *Jackson* and *Swaaley*, correctly distinguished those cases on the ground that the plaintiffs there relied on statutes mandating the payment of compensation (see Pet. App. A29-30).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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